

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

CARLOS O. CABALLERO DDS, MS, PS,
d/b/a Master Orthodontics, individually and on
behalf of all others similarly situated,

Plaintiff,

No.

COMPLAINT—CLASS ACTION

JURY DEMAND

MASSACHUSETTS BAY INSURANCE
COMPANY,

Defendant.

I. INTRODUCTION

Plaintiff Carlos O. Caballero DDS, MS, PS d/b/a Master Orthodontics (“Plaintiff” or “Caballero”), individually and on behalf of all other similarly situated members of the defined national class and the defined Washington subclasses (the “Class Members”), by and through the undersigned attorneys, brings this class action against Defendant Massachusetts Bay Insurance Company (“Defendant” or “MBIC”) and alleges as follows based on personal knowledge and information and belief:

COMPLAINT—CLASS ACTION - 1

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II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship from Defendant, there are 100 or more Class members nationwide, and the aggregate amount in controversy exceeds \$5,000,000. The Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1337.

2. This Court has personal jurisdiction over Defendant because Defendant registered to do business in Washington, has sufficient minimum contacts with Washington, and otherwise intentionally avails itself of the markets within Washington through its business activities, such that the exercise of jurisdiction by this Court is proper. Moreover, the claims of Plaintiff and all of the Washington subclass members in this case arise out of and directly relate to Defendant's contacts with Washington.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(3) because the Court has personal jurisdiction over Defendant, a substantial portion the alleged wrongdoing occurred in this District and the state of Washington, and Defendant has sufficient contacts with this District and the state of Washington.

4. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. §13391(b)(2) because a substantial part of the events or omissions giving rise to the claims at issue in this Complaint arose in this District. Plaintiff's places of business are located in Bremerton, Washington, Kitsap County; Port Orchard, Washington, Kitsap County; and Gig Harbor, Washington, Kitsap County. This action is therefore appropriately filed in the Tacoma Division because a substantial portion of the events giving rise to this lawsuit arose in Kitsap County.

III. PARTIES

5. Plaintiff Carlos O. Caballero DDS, MS, PS d/b/a Master Orthodontics, owns and operates an orthodontics practice in three locations, 55 NE Fairgrounds Rd., #100 and #102, Bremerton, Washington, 1890 Pottery Ave., Port Orchard, WA 98366, and 4700 Point Fosdick Dr. NW, #204, Gig Harbor, WA 98335.

6. Defendant Massachusetts Bay Insurance Company is an insurance carrier incorporated in New Hampshire and Massachusetts and whose headquarters are located in Worcester, Massachusetts.

7. Defendant MBIC is authorized to write, sell, and issue business insurance policies in all fifty states and the District of Columbia. MBIC conducted business within these states by selling and issuing business insurance policies to policyholders, including Caballero.

IV. NATURE OF THE CASE

8. Plaintiff Caballero provides orthodontics services.

9. Due to COVID-19 and proclamations and orders by Washington Governor Jay Inslee and/or other civil authorities, Plaintiff was forced to suspend or dramatically limit its orthodontics practice.

10. Plaintiff intended to rely on its business insurance to maintain income in case of an insured loss. This lawsuit is filed to ensure that Plaintiff and other similarly-situated policyholders receive the insurance benefits to which they are entitled and for which they paid.

11. MBIC issued one or more insurance policies to Plaintiff, including a Businessowners Insurance Policy and related endorsements, insuring Plaintiff's property and business practice and other coverages at all relevant times.

1 12. Plaintiff's business property includes property owned and/or leased by Plaintiff
2 and used for general business purposes for the specific purpose of providing orthodontics
3 services and other related business activities.

4 13. MBIC Businessowners Coverage promises to pay Plaintiff for risks of "direct
5 physical loss of or damage to" to covered property and includes coverage for risks for "loss of or
6 damage to" covered property.

7 14. MBIC's Businessowners Coverage Form provides Plaintiff with Business Income
8 Coverage, Extra Expense Coverage, Extended Business Income Coverage, Civil Authority
9 Coverage, and Denial of Access to Premises Coverage.

10 15. Plaintiff paid all premiums for the coverage when due.

11 16. On or about January 2020, the United States of America saw its first cases of
12 persons infected by COVID-19, which has been designated a worldwide pandemic.

13 17. In light of this pandemic, on February 29, 2020, Washington Governor Jay Inslee
14 issued Proclamation 20-5, declaring a State of Emergency for all counties in the state of
15 Washington as the result of COVID-19. Thereafter, Governor Inslee issued a series of certain
16 proclamations and orders affecting many persons and businesses in Washington, whether
17 infected with COVID-19 or not, requiring certain public health precautions.

18 18. On March 19, 2020, Governor Inslee issued Proclamation 20-24, "Restrictions on
19 Non Urgent Medical Procedures." The proclamation provides, in part:

20 WHEREAS, the health care person protective equipment supply chain in Washington
21 State has been severely disrupted by the significant increased use of such equipment
22 worldwide, such that there are now critical shortages of this equipment for health care
23 workers. To curtail the spread of the COVID-19 pandemic in Washington State and to
24 protect our health care workers as they provide health care services, it is necessary to
25 immediately prohibit all hospitals, ambulatory surgery centers, and dental orthodontic,
26 and endodontic offices in Washington State from providing health care services,

1 procedures and surgeries that require personal protective equipment, which if delayed,
2 are not anticipated to cause harm to the patient within the next three months[.]

3 19. On March 23, 2020, Governor Inslee issued Proclamation 20-25, “Stay Home—
4 State Healthy.” The proclamation requires that “[a]ll people in Washington State [] immediately
5 cease leaving their home or place of residence except: (1) to conduct or participate in essential
6 activities, and/or (2) for employment in essential business activities.” The proclamation prohibits
7 “all non-essential businesses in Washington State from conducting business, within the
8 limitations provided herein.”

9 20. Governor Inslee has extended Proclamation until May 31, 2020.

10 21. By order of Governor Inslee, orthodontists including Plaintiff were prohibited
11 from providing services but for urgent and emergency procedures.

12 22. No COVID-19 virus has been detected on Plaintiff’s business premises.

13 23. Plaintiff’s property has sustained direct physical loss and/or damages related to
14 COVID-19 and/or the proclamations and orders.

15 24. Plaintiff’s property will continue to sustain direct physical loss or damage covered
16 by the MBIC policy or policies, including but not limited to business interruption, extra expense,
17 extended business interruption, interruption by civil authority, denial of access to premises, and
18 other expenses.

19 25. Plaintiff’s property cannot be used for its intended purposes.

20 26. As a result of the above, Plaintiff has experienced and will experience loss
21 covered by the MBIC policy or policies.

22 27. Upon information and belief, MBIC intends to deny Caballero’s claim, and MBIC
23 has denied, and will deny coverage for other similarly situated policyholders.

V. CLASS ACTION ALLEGATIONS

28. This matter is brought by Plaintiff on behalf of itself and those similarly situated, under Federal Rules of Civil Procedure 23(b)(1), 23(b)(2), and 23(b)(3).

29. The Classes and Subclasses that Plaintiff seeks to represent are defined as:

A. ***Business Income Coverage Breach of Contract Class:*** All persons and entities in the United States insured under a MBIC policy with Business Income Coverage who suffered a suspension of their business at the covered premises related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities and whose Business Income claim was denied by MBIC.

B. *Business Income Coverage Breach of Contract Washington Subclass:*

All persons and entities in the State of Washington insured under a MBIC policy with Business Income Coverage who suffered a suspension of their business at the covered premises related to COVID-19 and/or orders issued by Governor Inslee, and/or other civil authorities and whose Business Income claim was denied by MBIC.

C. ***Business Income Coverage Declaratory Relief Class:*** All persons and entities in the United States insured under a MBIC policy with Business Income Coverage who suffered a suspension of their business at the covered premises related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities.

D. ***Business Income Coverage Declaratory Relief Washington Subclass:*** All persons and entities in the State of Washington insured under a MBIC policy with Business Income Coverage who suffered a suspension of their business at the covered

1 premises related to COVID-19 and/or orders issued by Governor Inslee, and/or other civil
2 authorities.

3 E. ***Extra Expense Breach of Contract Class:*** All persons and entities in the
4 United States insured under a MBIC policy with Extra Expense coverage who incurred
5 expenses while seeking to minimize losses from the suspension of business at the covered
6 premises in connection with COVID-19 and/or orders issued by Governor Inslee, other
7 Governors, and/or other civil authorities and whose Extra Expense claim was denied by
8 MBIC.

9 F. ***Extra Expense Breach of Contract Washington Subclass:*** All persons
10 and entities in the State of Washington insured under a MBIC policy with Extra Expense
11 coverage who incurred expenses while seeking to minimize losses from the suspension of
12 business at the covered premises in connection with COVID-19 and/or orders issued by
13 Governor Inslee, and/or other civil authorities and whose Extra Expense claim was
14 denied by MBIC.

15 G. ***Extra Expense Declaratory Relief Class:*** All persons and entities in the
16 United States insured under a MBIC policy with Extra Expense coverage who incurred
17 expenses while seeking to minimize losses from the suspension of their business at the
18 covered premises in connection with COVID-19 and/or orders issued by Governor Inslee,
19 other Governors, and/or other civil authorities.

20 H. ***Extra Expense Declaratory Relief Washington Subclass:*** All persons and
21 entities in the State of Washington insured under a MBIC policy with Extra Expense
22 coverage who incurred expenses while seeking to minimize losses from the suspension of
23

their business at the covered premises in connection with COVID-19 and/or orders issued by Governor Inslee, and/or other civil authorities.

I. ***Extended Business Income Breach of Contract Class:*** All persons and entities in the United States insured under a MBIC policy with Extended Business Income coverage who suffered a suspension of their business at the covered premises related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities and whose Extended Business Income claim was denied by MBIC.

J. ***Extended Business Income Breach of Contract Washington Subclass:***
All persons and entities in the State of Washington insured under a MBIC policy with
Extended Business Income coverage who suffered a suspension of their business at the
covered premises related to COVID-19 and/or orders issued by Governor Inslee, and/or
other civil authorities and whose Extended Business Income claim was denied by MBIC.

K. ***Extended Business Income Declaratory Relief Class:*** All persons and entities in the United States insured under a MBIC policy with Extended Business Income coverage who suffered a suspension of their business at the covered premises due to COVID-19 related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities.

L. ***Extended Business Income Declaratory Relief Washington Subclass:*** All persons and entities in the State of Washington insured under a MBIC policy with Extended Business Income coverage who suffered a suspension of their business at the covered premises due to COVID-19 related to COVID-19 and/or orders issued by Governor Inslee, and/or other civil authorities.

1 M. *Civil Authority Breach of Contract Class:* All persons and entities in the
2 United States insured under a MBIC policy with Civil Authority coverage who suffered a
3 loss of business income and/or extra expense related to the impact of COVID-19 and/or
4 orders issued by Governor Inslee, other Governors, and/or other civil authorities and
5 whose Civil Authority claim was denied by MBIC.
6

7 N. *Civil Authority Breach of Contract Washington Subclass:* All persons
8 and entities in the State of Washington insured under a MBIC policy with Civil Authority
9 coverage who suffered a loss of business income and/or extra expense related to the
10 impact of COVID-19 and/or orders issued by Governor Inslee, and/or other civil
11 authorities and whose Civil Authority claim was denied by MBIC.
12

13 O. *Civil Authority Declaratory Relief Class:* All persons and entities in the
14 United States insured under a MBIC policy with Civil Authority coverage who suffered a
15 loss of business income and/or extra expense related to COVID-19 and/or orders issued
16 by Governor Inslee, other Governors, and/or other civil authorities.
17

18 P. *Civil Authority Declaratory Relief Washington Subclass:* All persons and
19 entities in the State of Washington insured under a MBIC policy with Civil Authority
20 coverage who suffered a loss of business income and/or extra expense related to the
21 impact of COVID-19 19 and/or orders issued by Governor Inslee, and/or other civil
22 authorities.
23

24 Q. *Denial of Access to Premises Breach of Contract Relief Class:* All
25 persons and entities in the United States insured under a MBIC policy with Denial of
26 Access to Premises coverage who suffered a loss of business income and/or extra
 expense related to the impact of COVID-19 and/or orders issued by Governor Inslee,
27

1 other Governors, and/or other civil authorities and whose Denial of Access to Premises
2 claim was denied by MBIC.

3 R. *Denial of Access to Premises Breach of Contract Washington Subclass:*

4 All persons and entities in the state of Washington insured under a MBIC policy with
5 Denial of Access to Premises coverage who suffered a loss of business income and/or
6 extra expense related to the impact of COVID-19 and/or orders issued by Governor
7 Inslee, other Governors, and/or other civil authorities and whose Denial of Access to
8 Premises claim was denied by MBIC.

9 S. *Denial of Access to Premises Declaratory Relief Class:* All persons and
10 entities in the United States insured under a MBIC policy with Denial of Access to
11 Premises coverage who suffered a loss of business income and/or extra expense related to
12 the impact of COVID-19 and/or orders issued by Governor Inslee, other Governors,
13 and/or other civil authorities.

14 T. *Denial of Access to Premises Declaratory Relief Washington Subclass:*
15 All persons and entities in the state of Washington insured under a MBIC policy with
16 Denial of Access to Premises coverage who suffered a loss of business income and/or
17 extra expense related to the impact of COVID-19 and/or orders issued by Governor
18 Inslee, other Governors, and/or other civil authorities.

19 30. Excluded from the Classes and Subclasses are Defendant's officers, directors, and
20 employees; the judicial officers and associated court staff assigned to this case; and the
21 immediate family members of such officers and staff. Plaintiff reserves the right to amend the
22 Class definition based on information obtained in discovery.

1 31. This action may properly be maintained on behalf of each proposed Class under
 2 the criteria of Rule 23 of the Federal Rules of Civil Procedure.

3 32. **Numerosity:** The members of the Class are so numerous that joinder of all
 4 members would be impractical. Plaintiff is informed and believes that the proposed Class and
 5 Subclass contains hundreds of members. The precise number of class members can be
 6 ascertained through discovery, which will include Defendant's records of policyholders.

7 33. **Commonality and Predominance:** Common questions of law and fact
 8 predominate over any questions affecting only individual members of the Class. Common
 9 questions include, but are not limited to, the following:

10 A. Whether the class members suffered covered losses based on common
 11 policies issued to members of the Class and Subclass;

12 B. Whether MBIC acted in a manner common to the Class and Subclass and
 13 wrongfully denied claims for coverage relating to COVID-19 and/or orders issued by
 14 Governor Inslee, other Governors, and/or other civil authorities;

15 C. Whether Business Income coverage in MBIC's policies of insurance
 16 applies to a suspension of business relating to COVID-19 and/or orders issued by
 17 Governor Inslee, other Governors, and/or other civil authorities;

18 D. Whether Extra Expense coverage in MBIC's policies of insurance applies
 19 to efforts to minimize a loss relating to COVID-19 and/or orders issued by Governor
 20 Inslee, other Governors, and/or other civil authorities;

21 E. Whether Extended Business Income coverage in MBIC's policies of
 22 insurance applies to a suspension of business relating to COVID-19 and/or orders issued
 23 by Governor Inslee, other Governors, and/or civil authorities;

1 F. Whether Civil Authority coverage in MBIC's policies of insurance applies
2 to a suspension of business relating to COVID-19 and/or orders issued by Governor
3 Inslee, other Governors, and/or civil authorities;

4 G. Whether Denial of Access to Premises coverage in MBIC's policies of
5 insurance applies to a suspension of business relating to COVID-19 and/or orders issued
6 by Governor Inslee, other Governors, and/or civil authorities;

7 H. Whether MBIC has breached its contracts of insurance through a blanket
8 denial of all claims based on business interruption, income loss or closures related to
9 COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil
10 authorities;

11 I. Whether, because of Defendant's conduct, Plaintiff and the class members
12 have suffered damages; and if so, the appropriate amount thereof; and

13 J. Whether, because of Defendant's conduct, Plaintiff and the class members
14 are entitled to equitable and declaratory relief, and if so, the nature of such relief.

15 34. **Typicality:** Plaintiff's claims are typical of the claims of the members of the
16 classes. Plaintiff and all the members of the classes have been injured by the same wrongful
17 practices of MBIC. Plaintiff's claims arise from the same practices and course of conduct that
18 give rise to the claims of the members of the Class and are based on the same legal theories.

19 35. **Adequacy:** Plaintiff will fully and adequately assert and protect the interests of
20 the classes and has retained class counsel who are experienced and qualified in prosecuting class
21 actions. Neither Plaintiff nor its attorneys have any interests contrary to or in conflict with the
22 Class.

36. Federal Rule of Civil Procedure 23(b)(1), the Risk of Inconsistent or Varying Adjudications and Impairment to Other Class Members' Interests: Plaintiff seeks adjudication as to the interpretation, and resultant scope, of Defendant's policies, which are common to all members of the class. The prosecution of separate actions by individual members of the classes would risk inconsistent or varying interpretations of those policy terms and create inconsistent standards of conduct for Defendant. The policy interpretations sought by Plaintiff could also impair the ability of absent class members to protect their interests.

37. **Federal Rule of Civil Procedure 23(b)(2), Declaratory and Injunctive Relief:**
Defendant acted or refused to act on grounds generally applicable to Plaintiff and other members of the proposed classes making injunctive relief and declaratory relief appropriate on a classwide basis.

38. **Federal Rule of Civil Procedure 23(b)(3), Superiority:** A class action is superior to all other available methods of the fair and efficient adjudication of this lawsuit. While the aggregate damages sustained by the classes are likely to be in the millions of dollars, the individual damages incurred by each class member may be too small to warrant the expense of individual suits. Individual litigation creates a risk of inconsistent and/or contradictory decisions and the court system would be unduly burdened by individual litigation of such cases. A class action would result in a unified adjudication, with the benefits of economies of scale and supervision by a single court.

VI. CAUSES OF ACTION

Count One—Declaratory Judgment

(Brought on behalf of the Business Income Coverage Declaratory Relief Class, Business Income Coverage Declaratory Relief Washington Subclass, Extended Business Income Declaratory Relief Class, Extended Business Income Declaratory Relief Washington

1 *Subclass, Civil Authority Declaratory Relief Class, Civil Authority Declaratory Relief*
2 *Washington Subclass, Extra Expense Declaratory Relief Class, Extra Expense Declaratory*
3 *Relief Washington Subclass, Denial of Access to Premises Declaratory Relief Class, and*
4 *Denial of Access to Premises Declaratory Relief Washington Subclass)*

5 39. Previous paragraphs alleged are incorporated herein.

6 40. This is a cause of action for declaratory judgment pursuant to the Declaratory
7 Judgment Act, codified at 28 U.S.C. § 2201.

8 41. Plaintiff brings this cause of action on behalf of the Business Income Coverage
9 Declaratory Relief Class, Business Income Coverage Declaratory Relief Washington Subclass,
10 Extended Business Income Declaratory Relief Class, Extended Business Income Declaratory
11 Relief Washington Subclass, Civil Authority Declaratory Relief Class, Civil Authority
12 Declaratory Relief Washington Subclass, Extra Expense Declaratory Relief Class, Extra Expense
13 Declaratory Relief Washington Subclass, Denial of Access to Premises Declaratory Relief Class,
14 and Denial of Access to Premises Declaratory Relief Washington Subclass.

15 42. Plaintiff seeks a declaratory judgment declaring that Plaintiff's and class members
16 losses and expenses resulting from the interruption of their business are covered by the Policy.

17 43. Plaintiff seeks a declaratory judgment declaring that MBIC is responsible for
18 timely and fully paying all such claims.

20 **Count Two—Breach of Contract**

21 *(Brought on behalf of the Business Income Coverage Breach of Contract Class,
22 Business Income Coverage Breach of Contract Washington Subclass, Extended Business
23 Income Breach of Contract Class, Extended Business Income Breach of Contract Washington
24 Subclass, Civil Authority Breach of Contract Class, Civil Authority Breach of Contract
25 Washington Subclass, Extra Expense Breach of Contract Class, Extra Expense Breach of
26 Contract Washington Subclass, Denial of Access to Premises Breach of Contract Class, and
Denial of Access to Premises Breach of Contract Washington Subclass)*

44. Previous paragraphs alleged are incorporated herein.

45. Plaintiff brings this cause of action on behalf of the Business Income Coverage Breach of Contract Class, Business Income Coverage Breach of Contract Washington Subclass, Extended Business Income Breach of Contract Class, Extended Business Income Breach of Contract Washington Subclass, Civil Authority Breach of Contract Class, Civil Authority Breach of Contract Washington Subclass, Extra Expense Breach of Contract Class, Extra Expense Breach of Contract Washington Subclass, Denial of Access to Premises Breach of Contract Class, and Denial of Access to Premises Breach of Contract Washington Subclass.

46. The Policy is a contract under which Plaintiff and the class paid premiums to MBIC in exchange for MBIC's promise to pay Plaintiff and the class for all claims covered by the Policy.

47. Plaintiff has paid its insurance premiums.

48. Upon information and belief, MBIC has denied, and will continue to deny coverage for other similarly situated policyholders.

49. Denying coverage for the claim is a breach of the insurance contract.

50. Plaintiff is harmed by the breach of the insurance contract by MBIC.

VII. PRAYER

1. A declaratory judgment that the policy or policies cover Plaintiff's losses and expenses resulting from the interruption of Plaintiff's business related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other authorities.

2. A declaratory judgment that the defendant is responsible for timely and fully paying all such losses.

3. Damages.

4. Pre- and post-judgment interest at the highest allowable rate.

- 1 5. Reasonable attorney fees and costs.
- 2 6. Such further and other relief as the Court shall deem appropriate.

3 **VIII. JURY DEMAND**

4 Plaintiff demands a jury trial on all claims so triable.

5 DATED this 8th day of May, 2020.

6 KELLER ROHRBACK L.L.P.

7

8 By: s/Amy Williams-Derry
9 By: s/Lynn L. Sarko
10 By: s/Gretchen Freeman Cappio
11 By: s/Irene M. Hecht
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13 By: s/Maureen Falecki
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25 *Attorneys for Plaintiff*

26 4820-7486-9179, v. 2

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